SUPREME COURT, U.S.

In the Supreme Court of the United States

APR 12 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON, *Petitioner,*

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois, *Respondents.*

On Writ of Certiorari to the Supreme Court of Illinois

No. 1016

WAYNE DARNELL BUMPER, *Petitioner,*

vs.

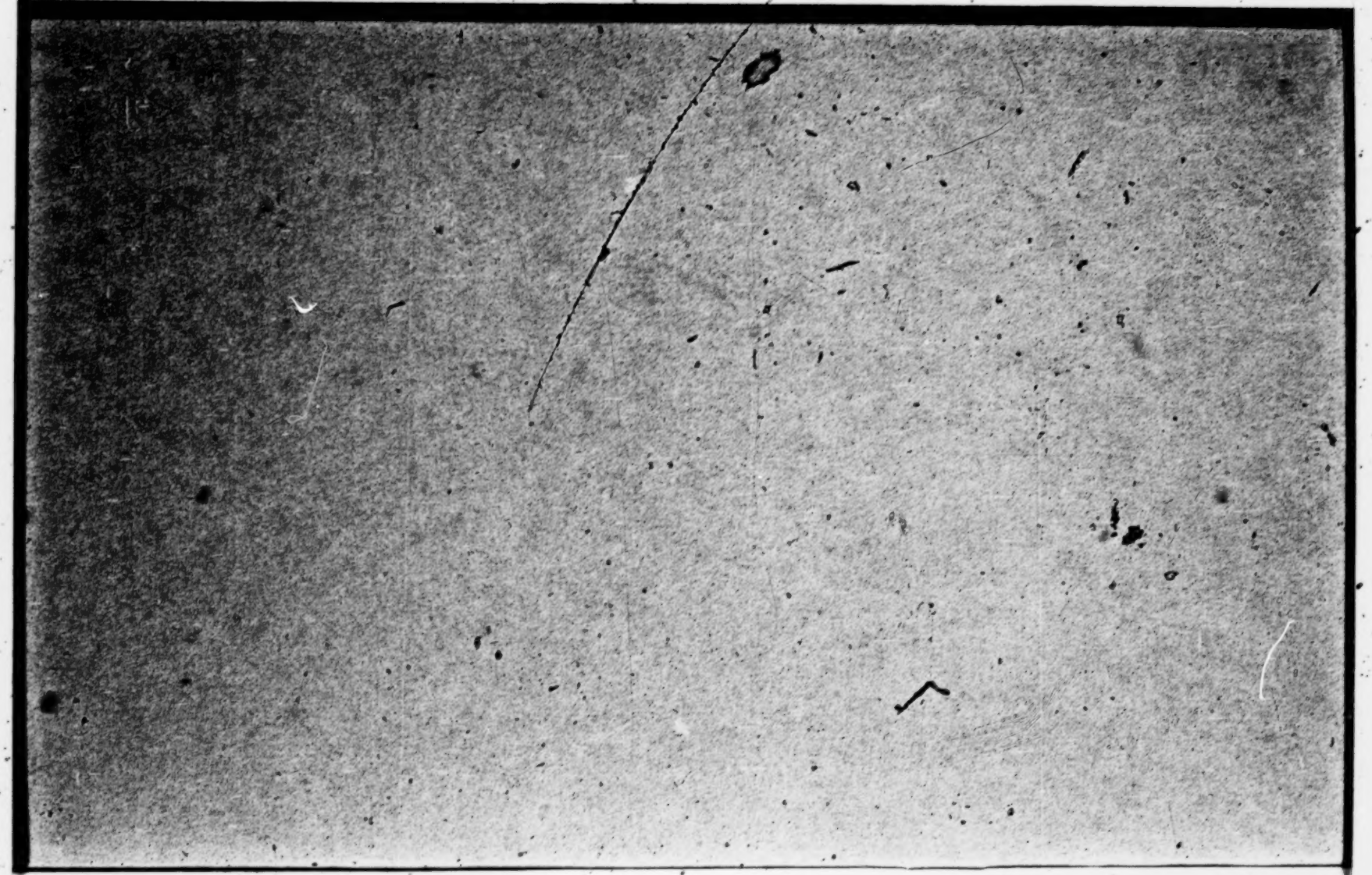
STATE OF NORTH CAROLINA, *Respondent.*

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE ON BEHALF OF RESPONDENTS, JOINED BY THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING

THOMAS C. LYNCH,
Attorney General of the State of California.
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California.
ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California,
GEORGE R. NOCK,
Deputy Attorney General of the State of California,
6000 State Building,
San Francisco, California 94102.

(The names of the state attorneys general joining in this brief *amicus curiae* are listed on the first two pages inside.)



MACDONALD GALLION,
Attorney General of the State of Alabama,
Montgomery, Alabama 36104.

DARRELL F. SMITH,
Attorney General of the State of Arizona,
State Capitol, Phoenix, Arizona 85007.

JOE PURCELL,
Attorney General of the State of Arkansas,
Justice Building, Little Rock, Arkansas.

DUKE W. DUNBAR,
Attorney General of the State of Colorado,
Denver, Colorado 80203.

DAVID P. BUCKSON,
Attorney General of the State of Delaware,
Dover, Delaware.

ARTHUR K. BOLTON,
Attorney General of the State of Georgia,

MARION O. GORDON,
Assistant Attorney General of the State of Georgia,
135 State Judicial Building, Atlanta, Georgia 30334.

ALLAN G. SHEPARD,
Attorney General of the State of Idaho,
Boise, Idaho.

ROBERT C. LONDERHOLM,
Attorney General of the State of Kansas,
Topeka, Kansas 66612.

JOHN B. BRECKINRIDGE,
Attorney General of the Commonwealth of Kentucky,
Frankfort, Kentucky.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana,
Baton Rouge, Louisiana 70804.

NORMAN H. ANDERSON,
Attorney General of the State of Missouri,

HOWARD L. MCFADDEN,
Chief of the Criminal Division,
Jefferson City, Missouri.

CLARENCE A. H. MEYER,
Attorney General of the State of Nebraska,
Lincoln, Nebraska 68509.

GEORGE S. PAPPAGIANIS,
Attorney General of the State of New Hampshire,
Concord, New Hampshire.

BOSTON E. WITT,
Attorney General of the State of New Mexico,
Santa Fe, New Mexico.

HELGI JOHANNESON,
Attorney General of the State of North Dakota,
Bismarck, North Dakota 58501.

WILLIAM B. SAXBE,
Attorney General of the State of Ohio,
Columbus, Ohio 43215.

G. T. BLANKENSHIP,
Attorney General of the State of Oklahoma,
Oklahoma City, Oklahoma 73105.

DANIEL R. MCLEOD,
Attorney General of the State of South Carolina,
Columbia, South Carolina.

FRANK L. FARRAR,
Attorney General of the State of South Dakota,
Pierre, South Dakota.

CRAWFORD C. MARTIN,
Attorney General of the State of Texas,
Austin, Texas 78711.

ROBERT Y. BUTTON,
Attorney General of the Commonwealth of Virginia,

RENO S. HARP, III,
Assistant Attorney General of the Commonwealth
of Virginia, Richmond, Virginia 23219.

JOHN J. O'CONNELL,
Attorney General of the State of Washington,
Temple of Justice, Olympia, Washington 98501.

JAMES E. BARRETT,
Attorney General of the State of Wyoming,
Capitol Building, Cheyenne, Wyoming 82001.

Subject Index

	Page
Interest of Amicus Curiae	2
Summary of Argument	3
Argument	5
I. There is no constitutional infirmity in the practice, followed by all federal and nearly all state courts, of excluding from juries trying capital cases those persons who profess, under oath, a bias against capital punishment	5
A. The Fourteenth Amendment does not prohibit jury exclusions having a rational purpose	5
B. Bias against the death penalty, at least where such bias would preclude its holder from imposing a death sentence, is a rational, and therefore constitutional, basis for excluding veniremen from a jury in a capital case	14
C. Mere opposition to capital punishment demonstrates implied bias and thus is a constitutionally sufficient ground for disqualification of jurors in capital cases	21
D. Petitioners have utterly failed to sustain their burden of proving that juries from which persons biased against the death penalty have been excluded are more likely to convict than those from which such persons have not been excluded	24
II. Should this court adopt a new constitutional rule governing the exclusion of potential jurors in capital cases on account of their bias against the death penalty, such a rule should be given prospective application only	25
Conclusion	35

Table of Authorities Cited

Cases	Pages
Carr v. State, 216 P.2d 333 (Okla. Crim. 1950)	10
Collins v. Walker, 335 F.2d 417 (5th Cir.) *cert. denied*, 379 U.S. 901 (1964)	7
Commonwealth v. Bentley, 287 Pa. 539, 135 Atl. 310 (1926)	11
Connors v. United States, 158 U.S. 408 (1895)	6
Fay v. New York, 332 U.S. 261 (1947)	8, 23, 29
Gideon v. Wainwright, 372 U.S. 335 (1963)	28
Hernandez v. Texas, 347 U.S. 475 (1954)	7
Hoyt v. Florida, 358 U.S. 57 (1961)	6
Johnson v. New Jersey, 384 U.S. 719 (1966)	33, 35
Jones v. State, 60 Tex. Cr. 139, 131 S.W. 572 (1910)	11
Juarez v. State, 102 Tex. Cr. 297, 277 S.W. 1091 (1925)	7
Lester v. State, 2 Tex. App. 432 (1877)	12
Linkletter v. Walker, 381 U.S. 618 (1965)	26
Logan v. United States, 144 U.S. 263 (1892)	29
Long v. United States, 360 F.2d 829 (D.C. Cir. 1966)	14
McClure v. State, 103 Tex. Cr. 158, 280 S.W. 784 (1926)	10, 11
Miles v. United States, 103 U.S. 304 (1888)	11
Miller v. California, 36 U.S.L. Week 3221 (1967)	29
People v. Ah Chung, 54 Cal. 398 (1880)	11
People v. Bandhauer, 66 Cal.2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967)	14
People v. Britton, 6 Cal.2d 1, 56 P.2d 490 (1936)	31
People v. Gonzales, 66 Cal.2d 482, 426 P.2d 929, 58 Cal. Rptr. 361 (1967)	19
People v. Mitchell, 61 Cal.2d 353, 392 P.2d 526, 38 Cal. Rptr. 726 (1964)	14
People v. Ray, 252 A.C.A. 1002, 61 Cal. Rptr. 1 (1967)	20
People v. Riser, 47 Cal.2d 566, 305 P.2d 1 (1956)	18
People v. Stewart, 7 Cal. 140 (1857)	15
People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958)	14
Pope v. United States, 372 F.2d 710 (8th Cir. 1967)	28
Reynolds v. United States, 98 U.S. 145 (1878)	11, 23
Schowgurow v. State, 240 Md. 121, 312 A.2d 475 (1965)	7
Shettel v. United States, 113 F.2d 34 (D.C. Cir. 1940)	22

Pages

Smith v. Texas, 311 U.S. 128 (1940) 7
Smith v. United States, 112 F.2d 217 (D.C. Cir.) *cert. denied*, 311 U.S. 663 (1940) 22
Spencer v. Texas, 385 U.S. 554 (1967) 19
Stalls v. State, 28 Ala. 25 (1856) 11
State v. Bunk, 4 N.J. 461, 73 A.2d 249 (1950) 11
State v. Curtis, 108 Kan. 537, 196 Pac. 445 (1921) 11
State v. Flint, 60 Vt. 304, 14 Atl. 178 (1898) 11
State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898) 28
State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894) 28
State v. Normandale, 154 La. 523, 97 So. 798 (1923) 11
Stovall v. Denno, 388 U.S. 293 (1967) 26, 27, 28, 33, 35

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 7
Turberville v. United States, 303 F.2d 411 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962) 10, 14, 24, 28

United States v. Puff, 211 F.2d 171 (2d Cir.) *cert. denied*, 347 U.S. 963 (1954) 28, 29
United States *ex rel.* Dukes v. Sain, 297 F.2d 799 (7th Cir.) *cert. denied*, 369 U.S. 868 (1962) 28

Webb v. Commonwealth, 314 S.W.2d 543 (Ky. 1958) 11

Codes

California Penal Code:
Section 190.1 19
Section 209 31
Section 1074 22
Section 4500 30

Constitutions

United States Constitution:
Fourteenth Amendment 3, 5

Texts

Annot., 48 A.L.R.2d 560 (1956) 15
31 Am. Jur., Jury, Section 158 23
78 Harv. L. Rev. 1658 (1965) 7
74 Yale L.J. 919 (1965) 7

In the Supreme Court
OF THE
United States

October Term, 1967

No. 1015

William C. Witherspoon, *Petitioner,*

vs.

People of the State of Illinois and Joseph Woods, Sheriff of Cook County, Illinois, *Respondents.*

On Writ of Certiorari to the Supreme Court of Illinois

No. 1016

Wayne Darnell Bumper, *Petitioner,*

vs.

State of North Carolina, *Respondent.*

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE ON BEHALF OF RESPONDENTS, JOINED BY THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING

INTEREST OF AMICUS CURIAE

In the instant cases, this Court has undertaken to review the constitutionality of the practice, nearly universal among states recognizing capital punishment, of disqualifying in capital cases prospective jurors who acknowledge bias against capital punishment. California excludes from capital juries those veniremen who swear that they cannot vote for a death sentence. The practice of the states joining California in this brief varies from the California practice, if at all, only in the nature or degree of bias against the death penalty which state law requires be entertained by a prospective juror to warrant his exclusion for cause from a capital jury.

The California procedure has been employed in the trials of all or virtually all of those of the state's 75 condemned men whose guilt was determined by a jury, as well as in the trials of several hundred other California prisoners charged with capital offenses who received sentences other than death. The practice has been deemed by the state, and so recognized by the courts of the state, as essential for the meaningful administration of the laws providing for the death penalty. Each of the states joining California in this brief is in a position to assert a state interest similar to that of California.

A ruling by this Court sustaining, in whole or in part, the position of petitioners, could profoundly affect the future conduct of capital trials in California and the supporting states, either by making it impossible to obtain death sentences or by injecting an unconscionable caprice into capital sentencing. If such a ruling were given retrospective application, it would have a chaotic effect on the

administration of justice in these states. Our interest in maintaining procedures which make possible the carrying out of deep-rooted state policies, and in avoiding the disruption of the administration of justice, brings The People of the State of California, and the states joining us, before this Honorable Court as *amici curiae*.

SUMMARY OF ARGUMENT

The Equal Protection and Due Process Clauses of the Fourteenth Amendment, insofar as they control the selection of juries, permit exclusions of prospective jurors when such exclusions have a rational basis. The due process guarantee of a fair and impartial jury assures only that a defendant in a criminal prosecution be tried by a jury which has no bias or prejudice preventing it from rendering a verdict according to the law and the evidence. When a jury has been impanelled without arbitrary exclusions, for cause, having been permitted, and the jury contains no member found to be biased against the defendant, the requirements of the Constitution have been met. No inquiry is required into the question of whether a jury from which rational exclusions have been made may be more likely to convict than one from which such exclusions have not been made.

The constitutional decisions of this Court have recognized and approved a wide variety of rational bases for disqualification of potential jurors. These include determinations that certain persons are unqualified to sit on any jury, and determinations that certain others are un-

qualified to sit on juries in particular cases, principally because of bias. Bias against one of the penalties which a jury has discretion to impose is a rational and therefore constitutional basis for exclusion from a jury whose decisions that bias may affect. Thus, a bias against the death penalty is a rational basis for excluding from a jury deciding a capital case a prospective juror holding such a bias. This is true whether the juror's hostility toward capital punishment constitutes merely "implied bias," which would not necessarily preclude him from imposing a death sentence, or "actual bias," which would so preclude him.

The core of petitioners' argument is the factual assertion that juries from which persons biased against the death penalty have been excluded is more likely to convict than one from which such persons have not been excluded. Our position is that demonstration of the truthfulness of this assertion would not entitle petitioners to relief. But we must also note that petitioners have failed utterly to sustain their burden of proof upon this very factual question.

Should this Court, nonetheless, find any sort of constitutional infirmity in the practices of Illinois and North Carolina, we strongly urge that any ruling invalidating such practices be given prospective application only. Petitioners' claim is that a jury from which persons biased against the death penalty have been excluded is unfair to the defendant on the issue of guilt. This claim could obviously be made by anyone convicted of any offense by such a jury, regardless of whether he received the death penalty. No rational basis appears for distinguishing the

condemned from other felons and honoring the "unfair jury" claim only if made by the former. And a retrospective application of the rule contended for by petitioners would necessitate thousands of retrials throughout the nation (not to mention the outright release of a necessary, though hopefully small, number of convicted murderers who cannot be retried), thus working an intolerably chaotic effect upon the administration of justice. Under the most recent prospectivity standard enunciated by this Court, limitation to prospective application only of any new ruling is clearly called for.

ARGUMENT

I

THERE IS NO CONSTITUTIONAL INFIRMITY IN THE PRACTICE, FOLLOWED BY ALL FEDERAL AND NEARLY ALL STATE COURTS, OF EXCLUDING FROM JURIES TRYING CAPITAL CASES THOSE PERSONS WHO PROFESS, UNDER OATH, A BIAS AGAINST CAPITAL PUNISHMENT.

A. The Fourteenth Amendment Does Not Prohibit Jury Exclusions Having a Rational Purpose.

We understand petitioners to present essentially two arguments: (1) the exclusion for cause, from the juries which tried petitioners, of persons who professed bias against capital punishment denied petitioners equal protection of the laws, in that it amounted to the exclusion of an identifiable group of persons and thus deprived petitioners of their right to be tried by a jury drawn from a cross-section of the community; and (2) the juries which tried petitioners were more likely to convict because of such exclusions, thus denying them due process.

Both these arguments "misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment." *Hoyt v. Florida,* 358 U.S. 57, 59 (1961). That right "requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service untrammeled by any arbitrary and systematic exclusions." *Ibid.* The foregoing language pithily summarizes the extent of the operation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment upon the area of jury selection. To restate the principle in a form more pertinent to the precise question before this Court in the instant cases, equal protection requires only that no arbitrary exclusions from juries be made (other than by peremptory challenge) and conversely, no jury exclusion denies equal protection if it has a rational basis. The right to trial by an impartial jury means only a right to be tried "by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States,* 158 U.S. 408, 413 (1895). Therefore, where an individual has been tried by a jury from which only exclusions having a rational basis have been made, and no juror can be shown to harbor the kind of bias or prejudice contemplated by *Connors,* he can make no complaint of unconstitutional jury exclusion. There is no need to inquire whether the jury which tried him was, or may have been, more likely to convict than would have been a jury from which the exclusions having a rational basis had not been made.

The proposition that a defendant is entitled to be tried by a jury drawn from a panel representing a "cross-

section of the community" merely embodies the principle that there must be no systematic exclusion from juries of any identifiable group on arbitrary grounds. Thus, it is arbitrary and irrational systematically to exclude jurors on the basis of race, *Smith v. Texas,* 311 U.S. 128 (1940), ancestry or ethnic affiliation, *Hernandez v. Texas,* 347 U.S. 475 (1954), religion, *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965); *Juarez v. State,* 102 Tex. Cr. 297, 277 S.W. 1091 (1925), or status as a day laborer, *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946). For that matter, it is irrational deliberately to *include* members of a particular race in a jury panel. *Collins v. Walker,* 335 F.2d 417 (5th Cir.), *cert. denied,* 379 U.S. 901 (1964), *noted in* 78 HARV. L. REV. 1568 (1965) *and* 74 YALE L. J. 919 (1965).

The principle was made clear by the Chief Justice, in discussing impermissible bases of jury exclusion:

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment *not based on some reasonable classification,* the guarantees of the Constitution have been violated." *Hernandez v. Texas, supra,* 347 U.S. at 478. (Emphasis added.)

The meaning of requirement that juries be drawn from "a cross-section of the community" can be fully understood only by examining the numerous permissible exclusionary practices which have the effect of removing huge segments of the community from the jury lists, or from particular juries. This examination will also lay to rest petitioners' argument that exclusionary practices

cannot properly bar from juries those most sympathetic to a particular class of defendants.

All jurisdictions exclude substantial segments of the community from any jury by establishing minimum qualifications for jury service. No one doubts that these qualifications, at least in the main, are constitutional. This Court has specifically approved those qualifications obtaining in New York state in 1947:

> "To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly." *Fay v. New York*, 332 U.S. 261, 266-67 (1947).

In addition, de facto exclusion results from the common, if not universal, state practice of allowing occupational exemptions from jury service. This Court has recognized and approved the following classes of exempt occupations:

> "[C]lergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, subeditors, reporters and copy readers." *Id.* at 267.

Clearly, the residuum of prospective jurors available for service after the operation of qualification and ex-

emption statutes such as the above constitutes something other than a "cross-section of the community." Just as clearly, however, such statutes are constitutional because they employ rational bases for jury exclusions. The qualifications required by these statutes are obviously related reasonably to the end of securing competent jurors or, in the case of citizenship qualifications, of absolving from the obligations of citizenship those who do not enjoy its rights. The exemption statutes represent rational legislative judgments that the exempted classes can serve society better by pursuing their occupations than by serving as jurors.

It is doubtful at best that the classes statutorily excluded by such qualification and exemption statutes are no more sympathetic than the community at large to defendants in criminal prosecutions. We submit that it is by no means unlikely that one or more of the excluded classes, such as clergymen, are peculiarly able to judge compassionately the individual accused of crime. And it is quite likely that particular defendants could benefit by the presence on a jury trying them of members of one or more of the excluded classes. Perhaps the largest excluded class, which approaches a majority in some communities, is that of minors. It is widely known that the bulk of anti-conscription sentiment throughout the nation is concentrated in the country's youth, particularly those under 21. Yet the young man accused of violating the selective-service laws is tried by a jury bereft of minors. No one would contend that he may successfully claim unconstitutional jury exclusion; the right to be tried by a jury of one's peers does not, after all, contemplate trial

by a jury composed in part of members of one's "peer group."

The foregoing demonstrates that substantial segments of the community can constitutionally be, and are, excluded even from jury *panels* without consideration of whether defendants, in general or in particular, are by virtue of such exclusions tried by juries bereft of members of the community most favorable to defendants' positions.[1] There is another group of permissible exclusions from individual juries which necessarily results in barring from the juries those most likely to vote in favor of defendant. This is the group of exclusions for bias, particularly bias against the law which defendant is charged with violating, or against the mandatory or permissible penalties for such violation.

To cite but a few examples, courts have sustained challenges for cause to veniremen on account of bias of the following varieties: bias against severity of penalty for a particular offense, *Carr v. State,* 216 P.2d 333 (Okla. Crim. 1950); *McClure v. State,* 103 Tex. Cr. 158, 280 S.W.

---

[1]"The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn. Chance governs the next step. The panel drawn by lot may or may not be a cross-section of the community." *Turberville v. United States,* 303 F.2d 411, 419 (D.C. Cir.), *cert. denied,* 370 U.S. 946 (1962). Under the foregoing view, the "cross-section" rule has no application to exclusions of individual jurors on voir dire examination after the panels are drawn. This view is confirmed by the cases, none of which, according to our research, has applied the "cross-section" rule beyond the point at which the panels are chosen. We suggest, therefore, that discussion of the "cross-section" doctrine in connection with the practice of allowing challenges of individual jurors for cause is at best irrelevant and at worst confusing, in that no one has contended that a given *jury* must be composed of a cross-section of the community.

784 (1926) (penalty for liquor law violation); *State v. Curtis,* 108 Kan. 537, 196 Pac. 445 (1921) (penalty for rape); scruples against imposition of penitentiary sentences, *Stalls v. State,* 28 Ala. 25 (1856); bias against imposition of any punishment for certain crimes, *State v. Normandale,* 154 La. 523, 97 So. 798 (1923) (statutory rape); bias against considering informer or accomplice testimony, *State v. Flint,* 60 Vt. 304, 14 Atl. 178 (1898), or convicting on circumstantial evidence, *People v. Ah Chung,* 54 Cal. 398 (1880); and refusal to apply the felony-murder rule, *State v. Bunk,* 4 N.J. 461, 73 A.2d 249 (1950), or to hold an accomplice liable to the same degree as an actual perpetrator, *Commonwealth v. Bentley,* 287 Pa. 539, 135 Atl. 310 (1926). Needless to say, a defendant has a correlative right to exclude from his jury any person who admits a prejudice against a particular defense upon which the accused may wish to rely. See, *e.g., Jones v. State,* 60 Tex. Cr. 139, 131 S.W. 572 (1910) (defense of mental incapacity or insanity); *Webb v. Commonwealth,* 314 S.W.2d 543 (Ky. 1958) (self-defense).

The principle that biased jurors may be excluded can be no less valid even if bias pervades a community. Thus, in *Miles v. United States,* 103 U.S. 304 (1888), and *Reynolds v. United States,* 98 U.S. 145 (1878), this Court upheld the challenges, for cause, in bigamy trials in Utah of those who stated a belief that polygamy was divinely commanded. It is a matter of common historical knowledge that in the Utah Territory of 90 years ago, a majority of the populace consisted of practitioners of a religion which did indeed then hold polygamy to be di-

vinely commanded, and would thus be biased in favor of the bigamist.

Postbellum Texas affords another illustration of the principle that widespread community bias in favor of a defendant is not sufficient to justify inclusion on a jury of persons holding that bias. Thus, in *Lester v. State*, 2 Tex. App. 432 (1877), a white man convicted of murdering a Negro claimed error in permitting the prosecutor to ask prospective jurors if they would as readily convict as if the victim had been white. The defendant, on appeal, "gravely" stated that since he was a white man and a Democrat, and the deceased a Negro and therefore a Republican, and since the jurors were required to swear that they regarded a Negro as highly as a white man, defendant was forced to trial by a jury of his "political enemies." The court, with undisguised revulsion, disposed of this argument by declaring that a venireman who would not regard with equal seriousness the murders of a white man and a Negro was biased and unfit to be a juror.

A contemporary example is provided by the current prosecutions for violations of the Civil Rights Act. In some communities there may be widespread antipathy toward the victims of such violations, the attorneys who prosecute such violations, and the Act itself. While there are no reported cases, we would be astounded to discover (1) that Justice Department attorneys conducting such prosecutions have failed to question prospective jurors with a view toward excluding for cause those biased against the prosecution or (2) that this Court, or any other federal reviewing court, would broadly dis-

approve such questions or challenges. Yet the jury which remains after such challenges are exercised is unquestionably more "prosecution prone" than it would have been absent such challenges.

The foregoing adequately refutes the contention that persons biased against particular laws or their enforcement, including laws providing for the death penalty, should be allowed to serve on juries, on the theory that one of the jury's functions is the nullification, through non-enforcement, of unpopular laws. This argument confuses the jury's power with its proper function, and betrays on the part of its proponents a preference for a government of men over a government of laws. Juries have the undoubted power to refuse to enforce any law or legal principle of which they may disapprove, and when a jury is composed in whole or in part of persons who are less than candid, on voir dire examination, in admitting their biases, nothing can be done about their irresponsible exercise of this power. But the law has never encouraged, and should never encourage, such jury lawlessness by seating jurors who frankly admit they will not enforce the law allegedly violated in a particular case. The proper body to repeal unpopular laws is not the jury, but the body which enacts such laws. This principle applies with special force to laws which are generally accepted but locally unpopular. It is one of the tragedies of our times that irresponsible juries can render powerless the efforts of law enforcement officers to protect the very lives of those seeking to exercise fundamental constitutional rights in localities where their exercise in a particular way by particular persons is discouraged by violence.

B. Bias Against the Death Penalty, at Least Where Such Bias Would Preclude its Holder from Imposing a Death Sentence, is a Rational, and Therefore Constitutional, Basis for Excluding Veniremen from a Jury in a Capital Case.

If we may consider it established that a venireman who acknowledges bias on an issue to be placed before a jury may constitutionally be excluded from that jury, even though his absence may render the jury more prone to reach a certain result than it would be were he on it, we think it plain that bias against the death penalty represents a perfectly constitutional ground for exclusion of a juror who, in the event of a guilty verdict, will be required to consider whether to impose the death penalty. This is particularly true where his bias is so profound as, by his own admission, to preclude him altogether from concurring in a death verdict.

Federal law, at least in the District of Columbia, permits jury exclusion in capital cases not on the basis of a venireman's mere opposition to capital punishment, but only if his opposition would prevent him from rendering a fair verdict on the basis of the evidence. *Turberville v. United States,* 303 F.2d 411, 421 (D.C. Cir.), *cert. denied,* 370 U.S. 946 (1962). See also *Long v. United States,* 360 F.2d 829, 834 (D.C. Cir. 1966), for an application of this test. California employs a similar test, disqualifying only those jurors whose consciences would preclude them from returning a death penalty verdict. See *People v. Bandhauer,* 66 Cal.2d 524, 531, 426 P.2d 900, 905, 58 Cal. Rptr. 332, 337 (1967); *People v. Mitchell,* 61 Cal.2d 353, 365, 392 P.2d 526, 534, 38 Cal. Rptr. 726, 734 (1964); *People v. Wein,* 50 Cal.2d 383, 394, 326 P.2d 457, 463 (1958). The California distinction is by no means of recent vintage. In

People v. Stewart, 7 Cal. 140 (1857) the California Supreme Court reversed a conviction on the ground that a juror had been excused for cause when he answered that he was "opposed to capital punishment on principle." The court distinguished between opposition on principle and conscientious opposition. Not only was the latter the only ground for challenge under the statute, but the two meant quite different things: principle might yield to rational argument; conscience cannot. Therefore, "a man may be opposed on principle to what he conscientiously believes to be right," *id.* at 143, and, conversely, may ignore his principles but not his conscience.

Some other jurisdictions, probably a minority, take substantially the same position as California and the District of Columbia. We will not attempt to identify each of these jurisdictions because the law in a particular state is not always clear. However, some examples of state rules which appear to be in accord with the California view may be found in Annot., 48 A.L.R.2d 560, 574-76 (1956).

We submit that the constitutionality of the California rule cannot seriously be questioned. Veniremen who swear that they would not concur in a death verdict are simply incapable of fairly deciding the question of penalty. They are unable to perform the duty imposed on a jury which has found an accused guilty of a capital offense—that is, to decide whether life imprisonment or death is the proper penalty. They have prejudged the case. In short, they harbor actual bias.

Opponents of the practice of disqualifying from capital juries those who are so opposed to the death penalty that

they could never impose it are forced to concede two general propositions: (1) biased jurors should not be seated, and (2) veniremen who cannot impose the death penalty are, in capital cases, biased. They contend, nonetheless, that bias against the death penalty does not provide a constitutionally sufficient basis for jury disqualification in capital cases. What are the arguments made in support of this contention?

It is first claimed that the state has no legitimate interest in seeking the death penalty. Since very few executions have occurred in recent years, it is argued there is only a remote chance of obtaining a death sentence. We cannot deny the paucity of executions during the years 1965 through 1967 inclusive (there have been ten). However, it does not follow that the practice of imposing death sentences has significantly declined during the same period, or that the recent sharp drop in the number of executions is anything but a temporary phenomenon. The only explanation we have found for the low execution rates of recent years is an increased willingness on the part of the courts to grant stays of executions. These stays have very rarely led to the vacating of any death sentences. The stays are uniformly temporary and we have confidence that they will, in nearly all cases, be vacated so as to allow the law to take its course. In the meantime, courts continue to impose death sentences at an apparently undiminished rate, and few persons are relieved of such sentences by executive clemency. Thus there are currently 75 persons under sentence of death in California, up from 62 on April 1, 1967. Since that date there have been one execution and one gubernatorial

commutation. We understand that there are more than 400 persons awaiting execution throughout the nation. While reversals of death sentences on direct appeal are not infrequent, at least in California, a substantial majority of those obtaining such reversals suffer reimposition of sentences of death. It therefore cannot seriously be contended that the imposition and ultimate execution of a sentence of death is so rarely the result of a capital trial as to warrant the conclusion that the state has no legitimate interest in seeking such a result.

A related argument is that the state has no legitimate interest in seeking the death penalty because society is adequately protected by imprisonment of the murderer. This overlooks the fact that Congress and the legislatures or electorates of 37 states have determined that adequate protection of society requires the existence of the death penalty for murder and, in some cases, other crimes. This judgment, we respectfully submit, is not one which governmental bodies are constitutionally forbidden to make. This argument typifies the approach taken in the brief of certain *amici*, which go far beyond the common issue presented in the instant cases and mount an attack upon the death penalty as unconstitutional *per se*. Though this Court declined to consider in these proceedings the question of the death penalty's constitutional validity, *amici* persist in inviting this Court to abolish capital punishment indirectly, by holding that it serves no legitimate governmental interest and thus does not justify measures which the federal and state governments have employed to make its imposition possible. We strongly urge this Court to reject the invitation. If the death penalty is

unconstitutional (and we would be happy to address ourselves to the question of its constitutionality should this Court ever deem the question sufficiently substantial to deserve consideration), it should be so held. If not, the question of whether to abolish capital punishment should be decided where it has always been decided—in the legislative halls and polling places of the nation. Men of reason and integrity cannot stomach the hypocrisy of judicial abolition by indirection.

It is next claimed that potential jurors should be allowed to serve on capital juries notwithstanding their inability to impose the death penalty, because they can fulfill their function under the law. It is reasoned that since—with but very few exceptions—state law does not require a jury to impose a death sentence, but merely places the choice of penalty in the jury's discretion, a juror can do what the law requires by exercising his discretion in favor of a life sentence. A juror unable to vote for the death penalty is thus claimed not to be in the position of a juror whose scruples prevent him from convicting under any circumstances, since the former can "follow the law" while giving his bias full rein. But this argument distorts the meaning of "discretion." As Chief Justice (then Associate Justice) Traynor put it, the discretion contemplated by California law is a discretion based on the evidence presented at trial, and not "the unswerving application of principles formulated before trial." *People v. Riser,* 47 Cal.2d 566, 575, 305 P.2d 1, 7 (1956). Thus, one who cannot impose the death penalty cannot "follow the law" (at least in California, and we would be surprised if a different result obtained in other

states), for he cannot exercise "'discretion'' as the law defines the term.

Finally, it is claimed that state and federal courts alike are required to adopt a "two-trial'' system in capital cases, with the issues of guilt and penalty decided by two different juries, and with persons unable to impose capital punishment excluded only from the penalty jury. Our answer to this is threefold. First, a two-trial system with separate juries does not exist anywhere.[2] Second, it is by no means constitutionally required, see *Spencer v. Texas,* 385 U.S. 554, 568 (1967). Third, under such a hypothetical two-trial system, state and federal governments would be able to exclude from the guilt trial, as well as the penalty phase, those persons who cannot impose the death penalty. The reason is simple: such persons simply cannot be fair and impartial on the issue of guilt.

---

[2]It has been asserted that California employs such a two-trial system. This assertion is misleading. California does provide (Cal. Pen. Code § 190.1) for a bifurcated trial whenever the death penalty may be imposed. If the jury finds the defendant guilty, a proceeding to determine penalty is commenced. But the statute expressly provides that "if the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty." *Ibid.* This section has been authoritatively construed as expressing a legislative preference for the same jury at both phases of the trial. *People v. Gonzales,* 66 Cal.2d 482, 499, 426 P.2d 929, 940, 58 Cal. Rptr. 361, 372 (1967). And we are aware of no instance under the California procedure where different juries have determined the issues of guilt and penalty, save in those cases where the California Supreme Court has reversed, as to penalty only, a judgment imposing a death sentence and a retrial has been limited to the issue of penalty. While other instances involving separate juries are conceivable under the California statute, it is certainly misleading to imply that they are commonplace or, indeed, have ever existed.

Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral. The state or federal governments can reasonably conclude, we submit, that despite any protestations to the contrary, a person scrupled against the death penalty cannot objectively judge the issue of guilt when he knows that a finding of guilt would permit a judge or another jury to impose a sentence of death. Such a person must know that his responsibility for the resultant execution would be just as great as if he himself had concurred in a death verdict. See *People v. Ray,* 252 A.C.A. 1002, 1023, 61 Cal. Rptr. 1, 13 (1967).

The foregoing arguments are, we submit, manifestly insufficient to remove the practice of disqualifying from capital juries those unable to impose the death penalty from the operation of the principle that bias is a constitutionally permissible ground for jury disqualification.

We have earlier discussed the California rule, which requires as a prerequisite to jury disqualification in capital cases an absolute inability to render a death penalty verdict. Whether the actual voir dire examinations in the instant cases were sufficient to meet that requirement or, if not, whether any defect was waived by failure to object at trial to the allowance of challenges for cause improper under local law, is a question we will gladly leave to the parties. But even if this Court should find some constitutional infirmity in the allowance of the particular challenges in these cases, we respectfully urge

that any new constitutional doctrine which this Court might choose to adopt should go no further than to require the federal and state courts to allow challenges for cause to capital jurors on account of their death-penalty views only if their views would preclude them from imposing the death penalty.

C. Mere Opposition to Capital Punishment Demonstrates Implied Bias and thus is a Constitutionally Sufficient Ground for Disqualification of Jurors in Capital Cases.

It has been suggested that this Court should adopt a constitutional rule permitting jury disqualifications in capital cases only where a prospective juror's views would preclude him from imposing a death sentence. Under such a test, mere opposition to the death penalty would not be grounds for disqualification, so long as the prospective juror swore he could set aside his opposition and return a death verdict in a proper case. The State of California, as *amicus curiae,* is in a difficult position with respect to this suggestion, since it calls, in effect, for the adoption of the California rule, and its adoption would thus not significantly alter the California practice. However, we cannot say that all states joining California in the instant brief employ rules similar to that of California. In deference to those states which do not, and because we believe that the California rule does not rise to the level of a constitutional requisite, we submit that the Constitution does not forbid disqualification of prospective capital jurors on grounds of mere opposition to the death penalty.

Bias against capital punishment which is of such a nature as utterly to preclude its holder from concurring

in a death verdict has been shown to constitute actual bias. But actual bias is not the only type of bias historically recognized as sufficient to disqualify a prospective juror. The common law, as well as particular statutes, have always recognized "implied bias" as a ground for challenge. Implied bias is bias conclusively presumed in law to arise from the existence of some fact which can be reasonably assumed to give rise to actual bias. When grounds for challenge on account of implied bias are enumerated by statute, they usually consist of blood or specific types of social relationships between a venireman and the accused, the complainant, or the victim. They also commonly include, in capital cases, scruples against the death penalty. A typical American statute is California Penal Code section 1074.

We have found no case in which this Court has struck down challenges for cause pursuant to any traditional ground of implied bias. Such grounds do, after all, reasonably give rise to an inference of actual bias. We cannot imagine this Court denying the right of the People, in a criminal case, to challenge for cause a prospective juror who happens to be the accused's brother, attorney, or employee, even if he swears that he could disregard his relationship to the defendant and try the case fairly.

The federal courts have recognized that conduct or beliefs, as well as relationship to the accused, complainant, or victim, can properly constitute a ground for challenge on account of implied bias. Thus, in *Shettel v. United States,* 113 F.2d 34 (D.C. Cir. 1940), and *Smith v. United States,* 112 F.2d 217 (D.C. Cir.), *cert. denied,* 311 U.S. 663 (1940), it was held proper, in a "numbers" prosecution,

to excuse for cause prospective jurors who stated that they had played numbers within the previous two years. And in *Reynolds v. United States*, 98 U.S. 145, 157 (1878), this Court upheld challenges for cause, in a bigamy prosecution, of prospective jurors who had been living in polygamy, without finding it necessary to determine whether the challenges were properly taken for "principal cause" (*i.e.*, implied bias) or for "favor" (*i.e.*, actual bias; see 31 AM. JUR. *Jury* § 158).

We submit that bias against the death penalty, regardless of whether it is of such a nature as to preclude its holder from concurring in a death verdict, constitutes implied bias and is therefore a constitutionally permissible basis for disqualification, in a capital case, of a prospective juror who entertains it. A belief that capital punishment is morally wrong is normally founded upon conscience, principle, or both. And conscience and principle profoundly motivate men. One whose conscience or principles would be offended by the imposition of a particular penalty can hardly be considered impartial on the question of whether such a penalty should be imposed, regardless of any protestations he may make to the effect that he could lay aside his beliefs and act objectively. Thus viewed, mere opposition to the death penalty presents a rational basis for disqualifying a juror in a capital case and therefore meets the constitutional requirements discussed *supra*.

To quote from *Fay v. New York*, 332 U.S. 261 (1947), "Society . . . has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury." *Id.* at 288-89. We respectfully sub-

mit that a defendant in a capital case who claims the right not to have excluded from the jury trying him those persons who admit a bias against the death penalty asserts nothing less than the "right to friends on the jury."

D. Petitioners Have Utterly Failed to Sustain their Burden of Proving that Juries from which Persons Biased Against the Death Penalty have been Excluded are More Likely to Convict than Those from which such Persons Have Not Been Excluded.

The core of petitioners' argument is the factual assertion, in the language of the Question upon which certiorari was granted in *Witherspoon*, No. 1015, that "the operation of the . . . statute providing that the state could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment . . . assured the state of a jury whose members were partial to the prosecution . . ." While we strongly urge that the truthfulness of this assertion is irrelevant to the constitutional issues before this Court, we must note that petitioners have utterly failed to sustain their burden of proving the assertion. It may be that such a claim is not even susceptible of proof. Courts have refused to take judicial notice of this claim. *See, e.g., Turberville v. United States*, 303 F.2d 411, 420-21 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962).

The records before this Court, as *amici* LDF-NORI implicitly acknowledge, see pp. 61-62 of their brief, are wholly insufficient to support petitioners' claims. We had contemplated the preparation of a specific and detailed analysis of each of the studies cited in petitioners' briefs,

and a demonstration of the failure of any or all of them to support petitioners' factual claims. However, we understand that an excellent dissertation covering the same ground will be presented in the briefs of respondents in *Witherspoon*, No. 1015. Rather than to bore the Court with a repetition of the same material, we shall rely on respondents' discussion of this point.

II

SHOULD THIS COURT ADOPT A NEW CONSTITUTIONAL RULE GOVERNING THE EXCLUSION OF POTENTIAL JURORS IN CAPITAL CASES ON ACCOUNT OF THEIR BIAS AGAINST THE DEATH PENALTY, SUCH A RULE SHOULD BE GIVEN PROSPECTIVE APPLICATION ONLY.

Our fundamental position, of course, is that there is no constitutional infirmity in the practices of state and federal courts which exclude from capital juries those biased against capital punishment, particularly where their bias is so profound as utterly to preclude them from imposing a death sentence. But should our position be rejected, in whole or in part, we strongly urge this Court to give prospective application only to any new constitutional ruling in this area.

This Court recently set forth the criteria guiding resolution of the question of whether to give retrospective application to a newly-announced constitutional doctrine relating to criminal procedure. These criteria are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on

the old standards, and (c), the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Application of these criteria, we submit, clearly calls for prospective application only of any new standards in the area of jury exclusion.

Should new standards be adopted, we can at this stage only speculate about "the purpose to be served by these new standards." It has been suggested that this Court rest its hypothetical ruling on the proposition that jurors biased against the death penalty constitute an identifiable segment of the community which cannot constitutionally be excluded, as a class, from any jury. This approach would find unnecessary the determination of whether the exclusion of such jurors renders capital juries less inclined to acquit. In view of the extremely weak case made by petitioners for the proposition the juries from which persons biased against the death penalty have been excluded tend to be "prosecution prone," such an approach would at least have the virtue of not having to rest upon factual foundation no more solid than a soap bubble (though it would be equally bereft of a foundation in legal theory). Should this Court prefer such an approach to one based on unproven factual assertions, the purpose of the new standards would be merely to make jury selection processes less exclusive, rather than to end a practice affecting the reliability of the guilt-determining process. Since enhancement of the integrity of the fact-finding process is the only factor which militates in favor of retrospective application of any constitutional ruling, see *Linkletter v. Walker,* 381 U.S. 618 (1965), the "iden-

tifiable segment of the community" approach would require prospective application only.

However, even if this Court somehow considered as established the proposition that juries from which persons biased on the issue of capital punishment had been excluded are "prosecution prone," it would not follow that retrospective application of new standards would be required. "The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.', 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno, supra* at 298. We submit that the probability that the practices here under attack have significantly affected the reliability of the guilt-determining process in the cases where they have been employed is exceedingly remote. Viewing petitioners' factual contentions in the light most favorable to petitioners' claims, they speak only in terms of "tendencies" on the part of the class of excluded jurors to be more sympathetic to defendants than were the juries as actually constituted. No claim is made that any juror in any capital case was in any way biased against the accused. Moreover, had persons biased against capital punishment not been excluded for cause on the basis of their views on the death penalty, they would in most cases have been excluded through the use of peremptory challenges, or perhaps for cause on some other ground, such as the inability to render a verdict of guilty in a capital case. Compared with the patent unfairness arising from, for example, a lack

of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), any conceivable unfairness in the practices challenged here would be extremely speculative. It is doubtful that such speculative unfairness could be as pronounced as that arising from a mistaken identification resulting from an improperly-conducted lineup. Since constitutional rules designed to promote fairness in lineup procedures were not given retrospective application, *Stovall v. Denno*, *supra*, neither should any new rules the Court might see fit to make which would impair the states' right to exclude jurors for bias on an issue in the case they are to decide.

"The extent of the reliance by law enforcement authorities on the old standards" is fully as pervasive in the area of jury-selection procedures as it was in the area of lineups. The courts of at least 35 states and the federal system have, it may safely be assumed, allowed challenges for cause of venirement opposed to the death penalty, under applicable local standards, in every case in which the prosecution sought the death penalty. The only two courts which have ever disallowed such challenges have rested their decisions upon the construction of local statutes. See *State v. Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State v. Garrington*, 11 S.D. 178, 76 N.W. 326 (1898). The federal courts of appeals have repeatedly and recently upheld the practices. See, *e.g.*, *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962); *United States ex rel. Dukes v. Sain*, 297 F.2d 799 (7th Cir. 1962), *cert. denied*, 369 U.S. 868, *United States v. Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963

(1954). Although this Court has never written an opinion expressly affirming the constitutionality of the practice of excluding capital jurors for bias against the death penalty, the practice was sustained by this Court as a matter of federal law in *Logan v. United States*, 144 U.S. 263, (1892). And, of course, this Court has consistently declined to review decisions upholding the practice (and did so as recently as December 5, 1967, see *Miller v. California*, 36 U.S.L. Week 3221, 3226).

Amici LDF-NORI claim that "*Fay v. New York*, 332 U.S. 261 (1947), pretty plainly told those who cared to read that *if and when the practice could be proved to result in prosecution-prone or unfairly biased juries*, the Court would strike it down." Brief for *Amici* LDF-NORI, p. 87. This is, quite simply, a serious distortion of *Fay*. That case did imply that if it could be proved that the jury-selection procedures there under consideration resulted in juries which were "organized to convict," the practices would be struck down. But those practices involved highly selective jury-picking procedures which were justified solely by convenience in judicial administration and not by the necessity for obtaining competent jurors.

We submit that reliance upon the "old standards" (if the present practices are to be replaced) is clearly as extensive in the instant cases as it has been in any of the cases where this Court has declined to apply retrospectively a new constitutional doctrine.

The final criterion is "the effect on the administration of justice of a retroactive application of the new standards." The effect, quite simply, would be chaotic. The essence of petitioners' claim is that the exclusionary prac-

tices complained of denied them a fair trial on the issue of guilt. Should this claim be sustained, it could be urged by every person convicted of any offense, regardless of the sentence he actually received, by a jury from which had been excluded persons conscientiously opposed to the death penalty. The number of persons who fall into that category, and would thus presumably[3] be entitled to a new trial were the Court to give retrospective application to a ruling overturning the exclusionary practices, is enormous. Regrettably, we cannot present the Court with precise figures, or even reasonably accurate estimates. However, some rough estimates may help elucidate the problem.

The Bureau of Criminal Statistics, California Department of Justice, has helpfully provided us with some relevant statistics. In 1966, in California, 169 persons were convicted by juries of some offense after going to trial on a capital charge. There were 133 convicted after being charged with murder, 33 convicted after being charged with kidnaping, and 3 convicted after being charged with violating Cal. Pen. Code § 4500 (aggravated assault by a

---

[3]The Court could diminish the number of new trials somewhat by applying a type of "harmless error" rule. If, in a given case, the total number of excuses for cause, because of opposition to capital punishment, plus the number of peremptory challenges actually exercised by the prosecutor, did not exceed the number of peremptory challenges available to the prosecutor, any "error" in allowing the challenges for cause could be held harmless as the particular defendant, on the theory that every person excused for cause on this ground would have been excused peremptorily by the prosecutor were the challenge for cause not available. We would strongly urge that should this Court overturn present practices, and give its ruling retrospective application, the Court consider the application of such a "harmless error" rule to cases tried before the date of this Court's opinion in the instant case.

life prisoner). Each of these offenses carried a possible death penalty.[4] In each case in which such an offense is charged, therefore, the District Attorney has the right to challenge for cause any prospective juror who states, under oath, that his conscientious objections to capital punishment would preclude him from imposing the death penalty. How often that right is exercised, we have no way of knowing. But if it were exercised in only half the cases, the figure for California in 1966 would be 85. We may assume that figure would hold reasonably constant for recent years. Let us assume further that every person convicted during the last 10 years by juries selected in the manner complained of could challenge his conviction. The figure of 10 years is arbitrarily selected but not unreasonable. It allows for the fact that a great many persons have been serving their sentence (in prison or on parole) for considerably more than 10 years, as well as for the fact that some persons convicted within the last ten years have died and others have fully served their sentences. Accepting the figure of 10 years, however, it can be estimated that 850 California prisoners would claim a right to a retrial. To get some idea of the figure for the entire nation, it is again appropriate to multiply this figure by 10. California has approximately 10% of the national population. Although some states have never

---

[4]Kidnaping, a violation of Cal. Pen. Code § 209, is punishable by death only where the victim sustains bodily harm. However, a charge of bodily harm need not appear in the accusatory pleading in order for the pleading to charge a capital offense. *People v. Britton*, 6 Cal.2d 1, 56 P.2d 490 (1936). Accordingly, at any trial wherein the accused has been charged with violating Cal. Pen. Code § 209, the District Attorney may excuse for cause those veniremen who swear that they cannot return a death verdict.

had the death penalty, and others have recently abolished it, many states have a considerably wider range of capital crimes than California, notably including rape and armed robbery, and could thus be expected to have proportionately more persons serving various sentences who were tried by juries selected according to the complained-of practices.

The foregoing figures yield an estimate of 8500 prisoners or parolees throughout the nation who could claim the benefits of a restrospective application of the rule contended for by petitioners. The estimate is necessarily rough, and depending upon the accuracy of the assumptions upon which it is based, could easily be off by several thousand. We submit, however, that the group of persons whom a retrospective ruling could conceivably benefit is quite large. This fact demonstrates the severe impact on the administration of justice that would be occasioned by retrospective application of any new ruling.

The foregoing problem has been acknowledged by *amici* LDF-NORI, who suggest a "solution": application of a new ruling only to those who received a death sentence. With all due respect to the learned counsel for *amici,* we find this suggestion utterly preposterous. If, as petitioners claim, the jury-selection procedures attacked denied them a fair trial on the issue of guilt, there is no rational basis whatever for differentiation as to retrospective application between those who did and those who did not receive the death penalty. This Court has recognized as much by granting certiorari in *Bumper,* No. 1016, where the death penalty was not in fact imposed. It is unsound to assert that only those actually sentenced to death have

suffered "the full brunt of the practice." (Brief for *Amici* LDF-NORI, p. 91.) One who did not receive the death penalty should be in a stronger position than one who did to assert the claim, since as to him, the jury exclusion proved in retrospect not to be necessary. Assuming that the burden on each state and county of retrying only those sentenced to death would be tolerable (a dubious assumption indeed, in view of the fact that California has 75 men under sentence of death, 34 of them tried in Los Angeles County), this fact should not constitute a basis for differentiation. In both *Stovall v. Denno, supra,* and *Johnson v. New Jersey,* 384 U.S. 719 (1966), this Court declined to give persons under sentence of death the benefit of new constitutional rules which it had just articulated in cases involving both capital and non-capital defendants. In each such case it could be argued that the "full brunt" of the complained-of practice fell on those sentenced to death, precisely because they were sentenced to death. And it is no answer to claim that the practices here under attack are "uniquely related to death cases." Although they are uniquely related to cases involving capital charges, they affect equally all those convicted, regardless of the penalty actually imposed.

We can think of only one theoretical basis for the suggested distinction: that the instant litigation has as its sole but covert purpose the judicial abolition by indirection of the death penalty. This end is all but admitted by *amici* LDF-NORI to be their aim. See pp. 2-M-5-M of their brief. We have no doubt that a retrospective application of a constitutional rule forbidding the exclusion

from capital juries of those veniremen who cannot impose the death penalty would drastically reduce the number of persons executed, and conceivably could wipe out capital punishment altogether.[5] We can only repeat that judicial abolition by indirection is a goal which cannot be countenanced. If the death penalty is constitutional, the state and federal governments must be allowed the means to impose it.

For the foregoing reasons, we strongly urge this Court to give prospective application only to any new constitutional ruling which may be the product of the instant litigation. We suggest that this could be accomplished by affirming the judgment in *Witherspoon*, No. 1015, on the ground that the petitioner in that case is collaterally attacking his conviction. We do not mean, however, to imply that a ruling on retroactivity should be based on a distinction between direct and collateral attack. Rather, we contend that any new ruling should be applied only to cases where the trial commences after the date of this Court's opinion. This Court, however, has used cases on collateral attack as vehicles for giving prospective application only to rules announced in cases coming up on di-

---

[5]We cannot say that abolition of capital punishment would necessarily be the result of a ruling by this Court which would prevent the exclusion of jurors who cannot return a death verdict. It is clear, however, that such a ruling would introduce an unconscionable element of caprice into the administration of the death penalty. A given defendant could not receive a death sentence if a given panel contained so many persons unable to concur in a death verdict that the prosecutor's peremptory challenges would be insufficient to prevent at least one of them from getting on the jury. Imposition of the death penalty would thus increasingly turn on such chance factors as geography and composition of the panel (which may or may not reflect community sentiment), rather than upon the merits of individual cases.

rect attack, see *Stovall v. Denno* and *Johnson v. New Jersey, supra,* and we suggest that it would be proper to make a similar distinction between *Bumper,* No. 1016, and *Witherspoon,* No. 1015.

CONCLUSION

This Court should uphold the practice of disqualifying from capital cases those prospective jurors who are opposed to the death penalty. In any event, this Court should go no further than to hold that such disqualifications are permissible only where the prospective jurors are wholly precluded by their views from imposing the death penalty. Should this Court reject our position on the merits, its ruling should be given prospective application only.

Dated, San Francisco, California,
April 12, 1968.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,

ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California,

GEORGE R. NOCK,
Deputy Attorney General of the State of California,

On Behalf of All Attorneys General.